United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1658

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

LAWRENCE RALPH and DIVERS OTHERS,
Plaintiffs-Appellants,

VS.

THE BETHLEHEM STEEL CORPORATION and THE UNITED STEELWORKERS OF AMERICA,
Defendants-Appellees.

BRIEF FOR APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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LAWRENCE RALPH and
DIVERS OTHERS,

Plaintiffs,

vs.

THE BETHLEHEM STEEL CORPORATION and
THE UNITED STEELWORKERS OF AMERICA,

Defendants.

BRIEF FOR APPELLANTS.

Issue Presented for Review.

Upon the Record before the lower Court, did a triable issue of fact exist with regard to the question of fair representation of the Plaintiffs by the Defendant, United Steelworkers of America?

Statement of the Case.

This is an action brought by 471 employees of The Bethlehem Steel Corporation for incentive wages due and payable. The action is brought pursuant to Section 301 (a) of the Labor Management Relations Act, 1947, 29 U. S. C. 185, which provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or

between any such labor organizations may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The action was commenced on or about June of 1966. In January of 1973, motions were made by both Defendants for Summary Judgment pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure. Oral arguments were heard in April of 1973, and the Defendants' motions were granted on January 3, 1974, by the Decision and Order of Hon. John T. Curtin, District Judge for the Western District of New York (A. 5). The Plaintiff's appeal from that Decision and Order granting Summary Judgment.

Statement of Facts.

The 471 Plaintiffs in this action are mechanical and electrical maintenance workers in the strip mill of the Bethlehem Steel Corporation's Lackawanna plant. Their job is to service and maintain the machinery and equipment in the seven separate steel production units operating within the strip mill. These units are:

1. Hot mill proper.
2. Hot mill shipping.
3. Continuous pickler.
4. Tandem mills.
5. Coil skin mills.
6. Annealing.
7. Cold mill shipping.

The Plaintiffs are paid a "standard hourly wage rate" (A. 233) and in addition receive incentive earnings over and above the base standard hourly wage rate (A. 233).

It is not necessary to a determination of the issues to go into great detail on the mathematics and mechanics of the Plaintiff's incentive system. However, in May of 1956, an agreement supplemental to the main contract in force was entered into between the company and the union. This "May 25 agreement" (A. 233) required the company to create new incentive plans for all workers in the plant. Under the new plans it was required that all incentive wages be based on the worker's "standard hourly wage rate" instead of the old "tonnage" system (A. 233, A. 364).

In accordance with this May 25 agreement, new plans were instituted beginning on or about April 12, 1959, when the workers in the tandem mills began operating under their new standard hourly wage rate based incentive plan (A. 314). Next, the hot mill proper received its new plan on May 3, 1959 (A. 313). The annealing new plan began on November 29, 1959, and the continuous pickler plan began on February 28, 1960 (A. 317). Finally, the coil skin mills new incentive plan became effective April 10, 1960 (A. 315). The hot and cold mill shipping units are not relevant to this action for reasons which will become apparent.

In January of 1960, another supplemental agreement was executed between the union and the company. This is called the "January 4, 1960 Memorandum of Understanding" (R. 90). Its purpose was to define the term "equitable compensation" as the term is used in the main agreement. Concerning the standard hourly wage rate based incentives which were being put into effect, it provides that incentive wages

shall be paid to direct production workers who actually contribute to the production of steel when said steel production in the strip mill exceeds a certain percentage of maximum possible output. It also provides that in the case of indirect, nonproduction workers, such as the Plaintiffs, they shall receive sixty-seven percent of whatever incentives the direct workers receive (A. 364) (R. 90).

How the Plaintiff's Cause of Action Arose.

Since the Plaintiffs were nonproduction workers, they were entitled to 67% of incentive wages paid to production employees in the seven strip mill units. They began receiving these incentive earnings on April 17, 1960, when their new plan was put into effect (A. 313). In late 1959, all of these production units, *except hot and cold mill shipping,* began filing grievances protesting various aspects of their respective incentive plans. (This is why the hot and cold mill shipping units are not relevant to this action.) In similar fashion to these direct production units, the Plaintiffs filed a similar grievance in June of 1960 (A. 112, 113) complaining of the unfair and unequitable rates which they claimed the new incentive system generated. Two grievances were filed, one on behalf of the mechanical maintenance workers of the strip mill and one on behalf of the electrical maintenance workers of the strip mill (A. 112, 113). They bear the numbers B. 3139 and B. 3141. The language of each grievance is basically the same and they contain four areas of complaint.

1. They claim that the Plaintiffs should have been classified as direct production workers rather than indirect workers, thereby entitling them to greater incentive earnings.

2. They claim that the test representative period required by the May 25 agreement (A. 233) was unfair.

3. They request retroactive pay.

4. They claim that the rates as established for the new incentive system were unreasonable and unfair.

It was necessary for the Plaintiffs to file these grievances in June of 1960, since they knew that they would ultimately be entitled to 67% of whatever modifications, adjustments, or retroactive payments were made to direct workers in settlement of the production grievances (Rosser Deposition—Page 98-102) (R. 89).

The hot mill proper production grievance was resolved by a payment of money retroactively to the production workers on May 7, 1961. Nothing was paid to the Plaintiffs as a result of this settlement (A. 313).

The tandem mills production grievance was settled on May 7, 1961, and again a retroactive payment was made to those production workers. Nothing was paid to the Plaintiffs at that time (A. 314).

The coil skin mills production grievance was resolved on June 10, 1962, and retroactive payments were made "to all positions involved, *excepting the positions in the mechanical and electrical group*" (A. 315).

The annealing mill production grievance was resolved by several adjustments in March of 1962, in June of 1962 and in July of 1964 and retroactive payments were paid to the production workers involved. Nothing was paid to the Plaintiffs (A. 316).

The continuous pickler production grievance was resolved by adjustments made on April 27, 1960, June 14, 1960, and again sometime in 1966 (A. 317). Appropriate retroactive adjustments were made to each position involved *"except positions in the mechanical and electrical group"* (A. 316).

The record shows that all five (5) production grievances were resolved between 1961 and 1966 (A. 312). As they were being resolved and payments were being made to direct production workers, nothing was being paid to the Plaintiffs, as required by the contract. The Plaintiffs claim that they were entitled to retroactive payments from the company from 1961 through 1966 coinciding with the payment dates to the direct production workers, and further that the union through its international staff representative, ARTHUR JARDIN had an obligation to pursue the plaintiffs' rights in this regard in a reasonably diligent fashion instead of handling our grievances "with my tongue in my cheek" (Jardin deposition Page 19) (R. 63).

On June 2, 1964, at a meeting of the Joint Incentive Committee (the last grievance stage prior to arbitration) the union withdrew the issue relating to the fairness of the representative test period and the issue requesting direct production worker status for the Plaintiffs (A. 353). In addition, the union accepted a statement of the company that any adjustments which may be made in incentives to production workers will also be made to the nonproduction workers (A. 353). On June 2, 1964, at least four out of five of the production grievances had already been settled and retroactive payments made. This commitment by the company was accepted by the union in disposition of the grievance at that time. In November of 1964, the Plaintiffs had still been paid

nothing and the matter came up before an arbitrator for final hearing and disposition, at which hearing the company reiterated its position to the effect that "the company has made the statement on numerous occasions that as to the outcome of those rates (production rates) if they are changed, that the appropriate changes will be made in the rate in question" (A. 335). Again, the union accepted this statement on behalf of the company despite the fact that four out of five of the production grievances had already been resolved, some as early as 1961.

The umpire's decision in the Plaintiffs' grievances is dated July 12, 1965 (A. 374), and points out the fact that all of the issues in the Plaintiffs' grievances have been withdrawn, except as to the retroactive payments which might be due because of incentive adjustments. As to that issue, the umpire finds that it has been resolved by the company's agreement to pay retroactive wages to the Plaintiffs when and if adjustments are made to the direct production workers involved. As a result of the withdrawal by the union and the acceptance of the company's statement, the plaintiffs' grievances were dismissed.

Handling of Hot Mill Proper and Tandem Mill Production Grievances.

These are two of the production grievances which were resolved by payment to direct production workers retroactively to May 7, 1961. The plaintiffs would be entitled to 67% of these adjustments. In May of 1961, the company proposed certain retroactive adjustments and gave the union until July 15, 1961, to give notice to the company whether or not the revised rates would be satisfactory (A. 360). The July

deadline passed with no objection from the union (A. 360). In November of 1961, at a meeting of the Joint Incentive Committee, the company took the position that the proposed adjustments were final and binding because the union made no complaint prior to the July 15 deadline (A. 359).

On January 3, 1962, the union attempted to appeal these grievances to arbitration, obviously because it disagreed with the proposed adjustments of the company (A. 360) (Jardin Dep. R. 63 p. 24). By Decision dated May 23, 1963, the umpire dismissed this effort by the union since an appeal must be filed within 20 days (A. 358).

As a result of the union's failure to file a timely appeal protesting retroactive adjustments which they apparently felt were not proper, both the production workers and the Plaintiffs are bound to accept the company's initial proposal.

The Company.

The Plaintiffs' grievances were dismissed by Decision dated July 12, 1965. This action was commenced approximately one year later and the company then announced, for the first time, that all of the records necessary to calculate the retroactive amounts due to the Plaintiffs had been lost, misplaced, stolen or destroyed (A. 312). It appears that the first search for necessary records was made in June of 1966 and nothing could be located (Rosser Dep. R. 89, p. 25) (A. 312). The company Memorandum dated November 15, 1966 (A. 312), summarizes the problem as follows:

> "In summary, the possibilities of accurately calculating *our retroactive obligation to the mechanical and electrical maintenance people* at the strip mill is nil" (A. 319) (Emphasis supplied).

Summary of Facts.

The Plaintiffs' cause of action against both the union and the company is based upon the fact that from 1961 through 1966 retroactive payments were made to production workers as their grievances were resolved and no payments were made to the Plaintiffs. Further, that the union international staff representative, ARTHUR JARDIN, handled plaintiffs grievances in an arbitrary or perfunctory manner, by failing to insist that payments be made to coincide with payments to direct workers. In addition, even those adjustments that were made to the hot mill and tandem mill were felt to be insufficient by the union, but due to the inaction of the union they were precluded from contesting these adjustments. Finally, the loss or destruction of all necessary Records precludes a calculation of the amount due to the Plaintiffs, and the reason no payment was made is stated by the company, as follows:

> "We did not adjust the IA. for the mechanical and electrical positions . . . for reasons now unknown." (A. 317).

Argument.

ARTHUR JARDIN was the UNITED STEELWORKERS International Staff Representative at the time the Plaintiffs cause of action arose. He indicates in his deposition (Page 19) taken on June 16, 1971, that the representation of the Plaintiffs in their November, 1964, arbitration was done "with my tongue in my cheek." At Page 146 of the final arbitration hearing transcript (A. 330), Mr. Jardin in his opening statement to the impartial umpire states as follows:

> "Mr. Umpire, these two grievances before you are combined. While they are two different departments, one is the electrical maintenance and the other, the mechanical maintenance, the two rates are identical and they are paid the said way, off of the same units . . . *In this case, the units they are paid off of are not agreed to as yet; there are four or five units that have still got to be agreed to.* But, it is my understanding that when and if they are agreed to, that will reflect in the rate whatever they might get would reflect in this rate." (Emphasis supplied)

In other words, Mr. Jardin is saying on November 18, 1964, that there are four or five production units which have filed grievances which have not yet been resolved and that if and when they are agreed to, retroactive payments will also be made to the Plaintiffs, knowing full well that 4 out of 5 units were already paid (Jardin Dep. R.63 p. 14 and 15). It is our position that as International Staff representative, charged with the duty of representing the Plaintiffs in grievance procedures and of knowing what has gone on before and what has taken place regarding relating grievances, that Mr. Jardin had an absolute obligation to inform the umpire at that time, in November of 1964 that four out of five production grievances had already been resolved and restroactives had been paid, some as early as 1961.

Instead, Mr. Jardin permitted the dismissal of the grievances because of the company's statement that "the company has made the statement on numerous occasions that as to the outcome of those rates, if they are changed, that the appropriate changes will be made in the rate in question" (A. 335).

Further, Mr. Jardin had no right in June of 1964, to accept the same statement at the Joint Incentive Committee meeting (A. 353). At that time, it was well known by the union or cer-

tainly should have been known, that both the hot mill proper and tandem mills had received their retroactive payments at least two years prior with nothing having been paid to the Plaintiffs (A. 312).

Mr. Jardin states in his deposition that as far as he was concerned, all issues in the Plaintiffs' grievances had already been resolved prior to arbitration (Jardin Dep. R. 63, p. 43) and that he handled our grievances accordingly. We believe that the Court below erred by finding as a matter of law, that there were no open issues in the grievance (A. 14). If Mr. Jardin had properly handled our grievances, the Plaintiffs would have been paid through the years along with the production workers. The union permitted the company to withhold monies lawfully due to the Plaintiffs for a period of some six years and only after the commencement of this action does the company adopt the position that all of the records, which would be necessary to compute the amount due to the Plaintiffs are mysteriously missing. DAVID ROSSER has been the Chief of Payroll Accounting at the Lackawanna Bethlehem Steel Plant for 21 years and indicates that never in his 35 years with the plant have any records ever been lost or misplaced before. Instead of having received their retroactive payments through the years, Plaintiffs are now left in a position of having received nothing with no way to accurately calculate the amount due.

Concerning the supposedly lost or misplaced records, it is interesting to note that although the company claims it did not realize the records were lost until June of 1966, (Rosser Dep. R. 89, p. 83) that in May of 1966, the company's compromise settlement proposal (A. 321) was offered at the John F. Kennedy Union Hall. At that time, the local president, IRVING TROST, stated to the Plaintiffs "this is what the com-

pany says you have coming, and this is all you will get" (A. 301). The lower Court in its Decision seemed to accept, without question, each and every explanation that the union gave for its actions. It is not "beside the point" (A. 16) if Mr. Jardin misstated the issues to the arbitrator. To the contrary, it is very much in point, because if Mr. Jardin went into that arbitration hearing and into the prior proceedings ill prepared and with the attitude of representing the Plaintiffs with his tongue in his cheek, then we are entitled to a trial to prove that this amounts to arbitrary and perfunctory handling of the Plaintiffs' affairs.

We believe the District Court erred in finding as a matter of law that the "tongue in cheek" representation by Mr. Jardin "was simply a candid appraisal of the hopelessness of pressing the grievances to arbitration, made by an experienced negotiator" (A. 17).

Further, regarding the two production grievances which were dismissed for lack of a timely appeal by the union, the District Court should not have decided this issue on affidavits simply concluding the grievances had no merit (A. 17); especially since at the time, the union was actively seeking to go to arbitration (Jardin Dep. R. 63, p. 24 and 25). Rule 56 "authorizes summary judgment only where the moving party is entitled to Judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial" *Sartor vs. Arkansas Natural Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724 (1944).

In the case at bar, the Defendants should not be permitted to withdraw their witnesses from cross examination by substituting conclusory affidavits and then have the action decided on the strength of those affidavits. Their credibility

and the weight to be given to their opinion, should be determined after trial in the regular manner. See *Sartor supra.* See also Moores Federal Practice, Vol. 6, Page 2287.

Whether a union breached its duty of fair representation depends upon the facts of each case. There is no code that explicitly prescribes the standards that govern unions in representing their members. With the Decision in *Vaca vs. Sipes,* 386 U. S. 171 (1967) there came an expansion of the duty of the union to process grievances not only in a good faith manner and honestly, but to guard against performing that duty in a perfunctory or arbitrary manner. In *Griffin vs. International Union, United Automobile, A. A. I. W.,* 469 F. 2d, 181 (1972) (4th Cir.) the Court in recognizing this expansion points out that under *Vaca* the employees "must also have proved arbitrary or bad faith conduct on the part of the union in processing his grievance." DAVID E. FELLER, argued the case of *Vaca vs. Sipes* before the United States Supreme Court on behalf of the union. At the *New York University Twenty-First Annual Conference on Labor,* Mr. Feller spoke on the subject of *"Vaca vs. Sipes, One Year Later."* With regard to his argument in the Supreme Court he states:

> "We stayed away from the word 'arbitrary' like the plague. But the court did not. Again and again it used phrases such as 'arbitrary, discriminatory, or in bad faith.' The Plaintiff had to prove, the court said, arbitrary or bad faith conduct. And the word 'arbitrary' can be as broad as the courts want to make it." *New York University, Twenty First Annual Conference on Labor, Page 167.*

An examination of those Decisions subsequent to the *Vaca* case indicate clearly that a cause of action may exist despite the lack of hostile discrimination or bad faith conduct on the

part of the union. The test, now, is whether or not the union breached its duty of fair representation by dealing with the employees claim in bad faith or in an arbitrary manner. *Bazarte vs. United Transportation Union,* 429 F. 2d, (1970) (3rd Cir.).

In a 1970 Second Circuit Decision, *Simberlund vs. Long Island Railroad Company,* this Court states "had the brotherhood ignored the grievance claim or processed it in a *perfunctory* manner, it might be held to be guilty of a breach of its duty." (Emphasis supplied) *Simberlund vs. Long Island Railroad Company,* 421, F. 2d, 1219, 1226, (1970) (2d Cir.) It is true as Judge Curtin states in his Decision that there is language in the *Simberlund* opinion to the effect that it must be alleged that the union acted in bad faith (A. 20). However, this language appears at Page 1224 of the Court's opinion in *Simberlund* as a footnote only, and in view of the above quotation, should not be considered as the holding of the Court. We believe the Trial Court erred by requiring the Plaintiffs to show "personal animosity, hostility, ill will, and bad faith," in order to survive the motions for summary judgment. Whether or not ARTHUR JARDIN displayed poor judgment, negligence or inattention and whether or not his conduct in handling Plaintiffs' affairs "with my tongue in my cheek" (Jardin Dep. R. 64, p. 19 and 20) amounted to perfunctory or arbitrary conduct is a valid question of fact and entitles the Plaintiffs to a trial. The materials in the Record before the Court permit a choice of inferences. For purposes of the motion before the lower Court, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the Plaintiffs. *International Longshoremen vs. Pacific Maritime Association,* 44[illegible] F. 2d., 1061 (1971) (9th Cir.).

In the case at bar, the Plaintiffs have shown that the company owes them an undetermined sum of money representing their share of adjustments which were made through the years to direct production workers (A. 312). Their grievances were properly filed and every issue contained in each grievance was either withdrawn or permitted, by ARTHUR JARDIN, to be dismissed. At no time from 1960, when the grievances were filed, until July of 1965, when they were dismissed, was there ever a hearing regarding such things as the Plaintiffs' retroactive wages, how much was due, how it would be computed, when it would be paid, or any other issues relative to the Plaintiffs' grievance claim for retroactive pay. Instead, our International Staff Representative, knowing full well that four of the five production units were fully paid (Jardin deposition, Page 14) (R. 63) and knowing further that the Plaintiffs had received nothing went into the arbitration hearing in November of 1965, prepared by his own admission to represent the Plaintiffs in what we claim was a perfunctory fashion.

As a result of Mr. Jardin's action, the Plaintiffs' grievances were never actually determined on their merits by any arbitrator, and no award to the Plaintiffs has been made since that Decision in July of 1965. We submit that the District Court erred in not allowing the Plaintiffs' 301 Suit to proceed, in view of the facts before the Court. The Plaintiffs are entitled to a fair airing of their grievance on the merits somewhere, whether by the union, through contract remedies, or by a Court; something the Plaintiffs have not yet obtained in this case. *Steinman vs. Spector Freight,* 441, F. 2d 599 (1971) (2d Cir.)

Conclusion.

For the reasons set forth herein, the Plaintiffs request this Court to reverse the Decision of the District Court granting summary judgment to the company and the union and remanding this action to the District Court so that the Plaintiffs' Section 301 Suit can proceed.

Respectfully submitted,

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Dated: June 27, 1974.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
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RE: Lawrence Ralph
v
The Bethlehem Steel Corp. et al
Docket No. 74-1658

I, Roger J. Grazioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 31 day of July, 1974 I mailed 2 copies of a printed Appendix and ~~in~~ Brief the above case, in a sealed, postpaid wrapper, to: each of the following:

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at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

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Roger J. Grazioplene

Sworn to before me this

31 day of July, 19 74

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 75